Supreme Court, U.S.
FILED
SEP 23 1997
CLERK

No. 97-336

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UNITED STATES EX REL. PAMELA A. BERGE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Intervenor-Respondent,
and
THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, ROBERT F. PASS, SERGIO B. STAGNO, CHARLES A. ALFORD, AND KAREN B. FOWLER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONER

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September 23, 1997

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF OF PETITIONER

The first question presented—concerning the proper scope of review in determining whether to overturn a jury verdict for insufficient evidence and enter judgment for the movant as a matter of law—is central to the administration of justice and to honoring the constitutional limits on trial court and appellate reexamination of evidence, and needs to be settled. Nothing better illustrates the need for this Court to resolve the longstanding conflict over this standard than the decision below and respondents' brief in opposition.

Respondents never dispute—nor can they—that, in overturning the jury's verdict, the court of appeals relied repeatedly on respondents' controverted evidence. Indeed, respondents themselves freely rely throughout their statement of the case (just as they did below) on evidence that petitioner directly controverted. That reliance—by both the lower court and respondents—is irreconcilable with (1) this Court's holding in *Wilkerson* v. *McCarthy*, 336 U.S. 53, 57 (1949), that courts should "look only to the evidence and reasonable inferences which tend to support" the non-movant (*id.*; see Pet. 18, 20); (2) the distinction between entering a judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure and granting a new trial under Rule 59 (see Pet. 17); and (3) the Seventh Amendment limits on judicial reexamination of evidence (Pet. 20). Respondents not only do not contend otherwise, they do not even mention these authorities or arguments.

Respondents choose instead to belittle the idea that standards matter. "In the real world," respondents assert (echoing the lower court's pronouncements on the world of "Big Science," see Pet. App. 17a), "the variety of verbal formulations makes little if any difference in the outcome" of cases. Opp. 26. This is sophistry. Standards are frequently outcome-determinative: that is why so much of this Court's work is devoted to setting them, in contexts as disparate as due process, equal protection, reli-

gious freedom, and civil procedure. The difference between standards that either permit or forbid courts to weigh controverted evidence is plainly one that "will often be influential, if not dispositive, of [the result]." [1] But beyond that, the standard this petition asks this Court to articulate and require for all federal courts to follow is one that defines the respective roles of judges and juries in civil actions. That plainly is a matter of constitutional significance.

Petitioner demonstrates below that the conflict and confusion in the circuits over the scope of review on a motion for judgment as a matter of law is real, that respondents' waiver arguments are frivolous, and that the second and third questions presented in the petition are each important and worthy of review according to the standards this Court traditionally has employed. Indeed, in *United States* v. *Gaudin*, 515 U.S. 506, 516-17 (1995), the Court left open the second question; and the increasing importance of intellectual property only underscores the significance of the third question, which asks the Court to set the proper boundaries for federal preemption of state tort protection. But at bottom, the petition should be granted because the federal courts badly need the jurisprudential clarification on the scope of review under Rule 50 that only this Court can provide.

I.

Petitioner previously demonstrated that the court of appeals repeatedly and necessarily relied on respondents' evidence that was directly controverted by petitioner's substantial evidence that the court simply ignored. Pet. 19-20 & n.12. In particular, petitioner pointed out that—unlike the district court—the court of appeals disregarded the testimony of three distinguished academic expert wit-

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[1] *Schwimmer* v. *Service Corp. of America*, 459 U.S. 1007, 1009 (1982) (White, J., dissenting from denial of certiorari); *see also Dace* v. *ACF Indus., Inc.*, 722 F.2d 374, 376 (8th Cir. 1983) (Eighth Circuit standard probably "will result in fewer grants of motions for directed verdict").

nesses, one of whom had 30 years experience reviewing NIH grants, that respondent Fowler plagiarized petitioner's work and that the plagiarism would have been material to NIH. *Id.* at 19-20. That evidence alone fully supports, for example, a finding of materiality and falsity with respect to the "fourth alleged false claim" (Opp. 8), and therefore is sufficient to sustain the jury's verdict. See Pet. 8-9; Pet. App. 35a.

Respondents do not even address the lower court's reliance on controverted evidence. Indeed, their own opposition is replete with evidence that was controverted and that the jury was free to disregard.[2] They avoid the issue because there is no good answer to it: The only evidence a court should rely upon in deciding whether a jury verdict may be entered or affirmed as a matter of law is the evidence favoring the non-movant, together with only that portion, if any, of the movant's evidence that the jury was obliged to accept as a matter of law. Pet. 17. Any broader review necessarily would involve impermissible judicial weighing of the evidence.

1. Respondents instead claim first that the "conflict" among and within the circuits is "largely of [petitioner's] own creation." Opp. 19. Yet their own brief belies that claim. They concede that the Eighth Circuit has held on five separate occasions that " '[g]enerally, only evidence favoring the non-moving party should be considered,' " Opp. 23 & n.19 (quoting *Caudill* v. *Farmland Indus., Inc.*, 919 F.2d 83, 86 (8th Cir. 1990)), and they fail to cite

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[2] *See, e.g.*, Opp. 6 (asserting the "impossibility" that Dr. Fowler relied on Dr. Berge's work); *id.* at 7 (asserting that "Berge's dissertation was of no interest to Fowler"); *id.* at 8 (claiming that Berge's allegation of plagiarism "finds no support in the record"); *cf.* Opp. 9 & n.5 (discussing Inspector General's Report, which the district court refused to admit into evidence (*see* Pet. App. 5a), and properly so, because resource constraints make it "a mistake to view the Government's decision not to intervene in any individual *qui tam* case necessarily as a statement of its view on the merits of the case." Brief for the United States as Intervenor/Amicus Curiae 20-21).

at least seven additional Eighth Circuit cases that also follow the rule.[3] The fact that *one* panel in the Eighth Circuit, without explanation, did not follow the rule therefore is not sufficient to render the conflict a mere " 'intramural matter.' " Opp. 23 (citation omitted).

It is also a conflict that matters. Evidence favoring the movant may be so strong as to be incapable of being viewed in *any* light favorable to the non-movant, and thus may "overwhelm[]" weaker evidence that, viewed alone, would be sufficient to justify a jury's verdict for the non-movant. 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2529, at 297 (2d ed. 1994). It is precisely for that reason that courts expressly dispute the scope of review. For example, the Fifth Circuit has long held and recently confirmed that "the Court should consider all of the evidence—*not just that evidence which supports the non-mover's case*—but in the light and with all reasonable inferences most favorable to the party opposed to the motion." *Mattern* v. *Eastman Kodak Co.*, 104 F.3d 702, 705 (5th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3108 (U.S. July 21, 1997) (No. 97-126) (citation and internal quotation marks omitted) (emphasis added). In contrast, Judge Arnold eloquently summarized the significance of the Eighth Circuit's limited scope of review in *Dace* v. *ACF Industries, Inc.*, 722 F.2d 374, 376-77 (8th Cir. 1983). In that case, in addition to defending that standard as mandated by *Wilkerson*, he explained:

> Probably this formulation will result in fewer grants of motions for directed verdict than would result if

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[3] *See, e.g., Glover* v. *McDonnell Douglas Corp.*, 981 F.2d 388, 391-92 (8th Cir. 1992); *Nelson* v. *Production Credit Ass'n*, 930 F.2d 599, 604 (8th Cir. 1991); *Morgan* v. *Arkansas Gazette*, 897 F.2d 945, 948-49 (8th Cir. 1990); *Parten* v. *Consolidated Freightways Corp.*, 923 F.2d 580, 584-85 (8th Cir. 1991); *Environmental Protection Agency* v. *City of Green Forest*, 921 F.2d 1394, 1410 (8th Cir. 1990); *Howard* v. *Adkison*, 887 F.2d 134, 136 (8th Cir. 1989); *Martin* v. *White*, 742 F.2d 469, 472 (8th Cir. 1984).

> judges were free to take cases from the jury because of what they view as very strong evidence supporting the moving party. . . . This is a price, we think, worth paying for the jury system, which is enshrined in the Bill of Rights and sanctified by centuries of history. When questions of fact are involved, common sense is usually more important than technical knowledge, and twelve heads are better than one.

Dace, 722 F.2d at 376-77 (footnotes omitted).

The Eighth Circuit thus has set itself squarely on the side of the practice that gives effect to the Seventh Amendment and in opposition to the general practice in most other circuits.[4] This conflict is real, having been recognized not only by Justice White in his dissent from the denial of certiorari in *Schwimmer*, 459 U.S. at 1009, and by courts that have rejected the Eighth Circuit's rule (*e.g.*, *Mattern*), but in the repeated endorsement of the minority position by several commentators, including co-counsel for petitioner, whose views on the subject respondents misrepresent. Notably, although respondents assert that the Wright and Miller treatise supports the proposition that there is a " 'settled rule' " in " 'all circuits' " notwithstanding a " 'variety of verbal formulations,' " Opp. 25, 26 (citing § 2524, which discusses a different issue than § 2529), in fact, two editions of that treatise have acknowledged the conflict among the circuits and have endorsed the Eighth Circuit standard as "the correct rule." 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2529, at 299 (2d ed. 1994); see Pet. 17 & n.8 (discussing same).

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[4] Moreover, contrary to respondents' overstatement (Opp. 23), neither Sixth Circuit case cited by petitioner expressly limited its articulation of the scope-of-review standard to FELA cases or to cases in which judgment was granted at the close of plaintiff's case. *See Smelser* v. *Norfolk S. Ry.*, 105 F.3d 299, 306 (6th Cir. 1997), *petition for cert. filed*, 65 U.S.L.W. 3827 (U.S. June 4, 1997) (No. 96-1949); *Aparicio* v. *Norfolk & W. Ry.*, 84 F.3d 803, 807 (6th Cir. 1996).

The treatment of jury verdicts is affected not only by whether the case happens to arise in the Eighth Circuit, but by the composition of the panel within a particular circuit. That is because, in several circuits, panels sporadically follow the rule that is the norm in the Eighth Circuit. See Pet. 16 & n.4. When the question is as fundamental as whether a verdict rendered by a jury is to be cast aside by a district judge or an appellate panel, such disuniformity and confusion, when combined with the direct and longstanding conflict between the Eighth Circuit and the other courts of appeal, are compelling grounds for this Court's review.

2. The flawed analysis that respondents offer in opposing certiorari on the first question is highlighted by their contrived effort to escape review by frivolous procedural objections. Their lead argument (Opp. 1-3) is that the petition was jurisdictionally out of time because counsel of record was not a member of the Supreme Court bar at the time the petition was filed. But this Court's Rule 14.5, by its cross-reference to Rule 34, confirms that petitioner's failure to designate one of the three Supreme Court bar members who signed the petition as counsel of record is a defect only in form, and that having the designated counsel of record admitted within 60 days suffices to correct the problem. See also Robert L. Stern, Eugene Gressman, Steven M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 312 (7th ed. 1993).

Respondents also assert (Opp. 17-19) that the first question was not pressed or passed upon below. Their argument misapprehends the Court's standards, however, which are satisfied if the claim is either presented *or* passed upon, even "enigmatic[ally]." *Stevens* v. *Department of the Treasury*, 500 U.S. 1, 7-8 (1991); see *United States* v. *Williams*, 504 U.S. 36, 40-45 (1992); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 696 (1984). The court of appeals certainly passed upon the issue when it both articulated an "all" evidence scope-of-review and applied it with gusto. Pet. App. 17a; see *Stevens*, 500 U.S. 1, 7-8 (1991).

This Court has made it clear, moreover, that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). Petitioner urged the court below to affirm the judgment under Rule 50 in light of the substantial evidence that favored petitioner. Because petitioner is entitled to raise in this Court an equally broad sufficiency-of-the-evidence question, petitioner's decision to present only the more narrow question concerning the scope of review is plainly appropriate under *Yee*. See *id.* at 535 ("Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here."); *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (applying *Yee*).

At the end of the day, petitioner suffered the consequences of an appellate court that assumed the role of jurors. Most courts, by following the "all-evidence" scope of review, tacitly permit, and even encourage, that usurpation of the jury's role, but in the Eighth Circuit and under any fair reading of the Seventh Amendment that conduct is flatly proscribed. Respondents' core argument—that the issue is merely one of fungible "verbal formulations"—is at bottom an attack on one of the foundations of American law. Standards matter, and courts must exercise great care to ensure that the "verbal formulations" that juries hear as instructions and that judges follow are clear, precise, and accurate expressions of the law. *Addington* v. *Texas*, 441 U.S. 418, 423-25 (1979). Because the need for a definitive statement of the scope of review is both acute and particularly timely (see Pet. 20), this case warrants consideration by this Court.

II.

With respect to the second question—whether, in civil cases, the materiality of false statements is an issue for the jury to decide—respondents' principal argument is that the materiality holding "made no difference to the out-

come of the case below." Opp. 11. This is not true. First, respondents' argument depends on the validity of the lower court's sufficiency of the evidence holding, which the petition directly challenges. Second, the court's decision on materiality plainly contaminated its ruling on falsity: Once the lower court concluded that it was free to decide the question of materiality *de novo*, it proceeded to discuss falsity and materiality interchangeably—effectively applying the same standard to both. See Pet. App. 12a, 13a. The decision below thus aptly illustrates the practical importance of the question left open in *Gaudin*.

Respondents' next argument—that there is no conflict on the question—ignores its national importance. Materiality is an issue in every civil False Claims Act case and arises regularly in other federal tort cases. Moreover, because many questions of pure fact are bound up virtually inextricably with any decision of materiality (see *Gaudin*, 515 U.S. at 511-12), these fact questions—as a constitutional matter—may not be decided by a court.[5]

Respondents' further assertion (Opp. 13) that the lower courts are in accord with the Fourth Circuit on this issue is incorrect. Most notably, the Ninth Circuit has subsequently distinguished the decision on which respondents rely, stating that "in every post-*Gaudin* perjury-type case where we have reached the issue this Court has ruled that materiality, if an element, *must* be submitted to the *jury*," and citing in support both criminal *and* civil cases. *United States* v. *Uchimura*, No. 94-10579, 1997 WL 573130, *2 (9th Cir. Sept. 17, 1997) (emphasis added). Respondents' assertion also overlooks the position of the United States, which argued below that "materiality is

[5] Respondents' extraordinary claim (Opp. 14) that materiality involves a "consideration of what *legal* alternatives, if any, would be available to the government" is unsupported by any authority, including even the court below (Pet. App. 12a-13a), which recognized that the core issue is whether the respondents' statements would have affected the government's decision to approve particular grants. *See* Pet. 22-23.

properly a question for the jury." Brief for the United States as Intervenor/Amicus Curiae 34-37.

The confusion, if not conflict, in the lower courts is not surprising given that, in *Gaudin*, the Court justified its holding in important part on cases and authority drawn entirely from the civil context (see Pet. 21-22 & n.13), and because *Gaudin* repudiated *Sinclair* v. *United States*, 279 U.S. 263 (1929), which was the only authority for *Kungys* v. *United States*, 485 U.S. 759 (1988), on which respondents rely. *Gaudin*'s applicability to civil cases is thus an important and disputed question that this Court should no longer leave unresolved.

III.

As to the third question, involving the scope of the Copyright Act's preemption of state property protection, respondents claim that petitioner challenges only the "application of settled law to [her] claim." Opp. 27-28. That is a straw man. Petitioner's claim is that the so-called "extra element" test that some courts of appeals have adopted operates—by its terms—to preempt state law even in circumstances in which there is no basis to do so in the text of the Copyright Act or any principle of preemption jurisprudence or any copyright policy. The correct test, as set forth in the petition, would direct courts to determine "(1) whether the state law provides the plaintiff a right not available under federal law and, if so, (2) whether enforcement of that right would interfere with the goals of the Copyright Act." Pet. 27. Under that test, petitioner's claim is not preempted.

By attacking a straw man, respondents avoid coming to grips with the core problem. With the notable exception of *Kalitta*,[6] the lower courts, to avoid grappling with the

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[6] *G.S. Rasmussen & Assocs.* v. *Kalitta Flying Serv., Inc.*, 958 F.2d 896 (9th Cir. 1992). Respondents' attempt (Opp. 29) to isolate *Kalitta* is unpersuasive. The Eighth Circuit has cited *Kalitta* approvingly (see *National Car Rental Sys., Inc.* v. *Computer Assocs.*

delphic language of the Copyright Act's express preemption provision,[7] have resorted with little examination to an easy-to-use "test" that gets the right answer only some of the time. The growing importance of intellectual property to the nation's economy makes it essential that federal preemption not overstep its proper bounds, for state law affords important supplementary protection for rights that the Copyright Act does not protect. See *ProCD, Inc.* v. *Zeidenberg*, 86 F.3d 1447, 1453-55 (7th Cir. 1996) (discussing importance of state law as a supplement to copyright law).

In this case, for example, respondents were held liable under state law not for having copied petitioner's work, but for having publicly claimed ownership, without any attribution to her, of the ideas and application of research methods that were her valuable contribution to scientific research, thereby depriving her of a foundation for her academic career and impairing her reputation. The Copyright Act neither recognizes nor is threatened by state protection of these rights. The Court therefore should grant certiorari to replace the simple-minded "test" that the Fourth Circuit used by defining the boundaries of preemption under section 301 of the Copyright Act and giving guidance to the lower federal courts who must apply it.

CONCLUSION

For the reasons stated above and those in the petition, the petition for certiorari should be granted.

Int'l, Inc., 991 F.2d 426, 432-33 (8th Cir. 1993)), and the Fifth Circuit chose not to follow *Kalitta* in a case that, unlike this one, chiefly involved a state law claim of unlawful copying. See *Daboub* v. *Gibbons*, 42 F.3d 285, 289-90 (5th Cir. 1995).

[7] *See* Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.01[B], at 1-11 (1995).

Respectfully submitted,

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